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Martin v. Wilks: Playing by the Rules in Employment Discrimination Litigation

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NOTES

MARTIN V. WILKS: PLAYING BY THE RULES IN EMPLOYMENT DISCRIMINATION LITIGATION

Martin v. Wilks[1]

In a dissent from the denial of rehearing in the 1983 case *Ashley v. City of Jackson, Mississippi*,[2] then Justice Rehnquist expressed his inability to "understand the origins of the doctrine of 'collateral attack' employed by the lower courts . . . to preclude a suit brought by parties who had no connection with the prior litigation."[3] In the *City of Jackson* case,[4] non-minority employees filed "reverse discrimination" claims against the City of Jackson alleging a pattern of discrimination resulting from a settlement agreement between the City and minority employees.[5] The Fifth Circuit dismissed the claims because they constituted an "impermissible collateral attack" on the consent decrees.[6]

In *Martin v. Wilks* the Supreme Court, in an opinion authored by Chief Justice Rehnquist, rejected the doctrine of impermissible collateral attack.[7] The Court believed the doctrine deprived non-minority persons of their due process rights.[8] The majority dismissed the idea that a non-minority person's due process rights are subordinate to the goal of

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1. 109 S. Ct. 2180 (1989).
2. 464 U.S. 900 (1983).
3. *Id.* at 901-02.
4. Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982).
5. *Id.* at 67.
6. *Id.*
7. *Martin*, 109 S. Ct. at 2184; *see infra* notes 37-59 and accompanying text for a discussion of the development of the doctrine of impermissible collateral attack as employed in the federal circuits.
8. Throughout this note, "non-minority persons" is used to denote white, male employees, except as otherwise indicated. "Minority" identifies any recognized minority group. The reference to "original Title VII action" denotes an action filed by a minority employee against an employer. The "original Title VII action" is a logical prerequisite to the issues involved herein, namely, the difficulties arising out of "separate Title VII actions," also referred to as "reverse discrimination actions" describing Title VII actions filed by "non-minority persons."

providing equal employment opportunity for minorities. The majority opinion recognized that the "deep-rooted historic tradition that everyone should have his own day in court" required that in Title VII actions non-minority employees must be joined.[9] This Note will examine the effect of this decision on future employment discrimination litigation,[10] and the implications of the decision on existing consent decrees in the area of employment discrimination.[11]

I. LEGAL BACKROUND

A. *Consent Decrees*[12]

In a Title VII action, the plaintiff must prove a pattern or practice of intentional discrimination against the plaintiff on the basis of the plaintiff's race.[13] One of the remedies for past patterns of discrimination against minority groups is affirmative relief.[14] In the area of employment discrimination, the affirmative relief may take the form of temporary hiring or promotional ratios or goals.[15] The remedy calls for

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9. *Id.* at 2185 (citing 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

10. *See infra* notes 133-187 and accompanying text.

11. *See infra* notes 188-215 and accompanying text.

12. *See generally* Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155; Kramer, *Consent decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C.L. REV. 291 (1988); Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887; Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147 (1987). For the purposes of this note, discussion of consent decrees is limited to consent decrees in employment discrimination suits.

13. 42 U.S.C. § 2000e-5 (1986); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

14. Under Title 42 U.S.C. § 2000e-5(g): "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate . . . ." 42 U.S.C. § 2000e-5(g) (1986).

15. *See, e.g.*, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (union found guilty of engaging in a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act and ordered to admit a certain percentage of nonwhites to union membership by July 1982); United Steelworkers v. Weber, 443 U.S. 193 (1979) (reservation of 50% of all

employers to incorporate hiring and promotion guidelines for minorities into employment decisions, thus encouraging greater representation of existing minority groups in the workplace.[16]

This race-conscious remedy does not require participation in traditional adversarial processes.[17] Settlement of a pending Title VII action can provide the same relief for the minority groups. A settlement agreement between the minority plaintiffs and the employer is embodied in a consent decree,[18] which has been described as "a broad injunction negotiated by the parties and ratified as a court order by the signature of a federal judge."[19] Federal courts define a consent decree in various ways.[20] The Supreme Court, in *United States v. ITT Continental Baking Co.*,[21] stated that consent decrees held "attributes both of contracts and of judicial decrees."[22]

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openings in apprenticeship craft training program for minority complainants); Baker v. Detroit, 504 F. Supp. 841 (E.D. Mich. 1980) (temporary promotional goals with a ratio of 50% of all new promotions for both minority and non-minority groups).

16. *See Local 28*, 478 U.S. 421 (1986); United Steelworkers v. Weber, 443 U.S. 193 (1979); Baker v. Detroit, 504 F. Supp. 841 (E.D. Mich. 1980).

17. Voluntary affirmative action plans are one alternative. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Larson, *Race Consciousness in Employment after Bakke*, 14 HARV. C.R.-C.L. L. REV. 215 (1979).

18. For a collection of cases and analyses of the procedural makeup of consent decrees see Cooper, *supra* note 12 and Comment, *supra* note 12.

19. Schwarzchild, *supra* note 12, at 888. Consent decrees contain common elements, including: (1) statements of the existence of the underlying Title VII action, (2) statements denying the consent decree represents an admission of liability on the part of the employer, (3) enjoinment of future employment discrimination, (4) guidelines for the use of job applicant testing and screening procedures, (5) statements of goals in the recruitment, hiring and/or promotion of minority persons, (6) provisions for compensatory relief for victims of past discrimination, (7) requirements of procedures such as appointment of a monitor and requirements for recordkeeping, and (8) provisions for continued jurisdiction of the court over the matter. Schwarzchild, *supra* note 12, at 895-98. Most are also characterized by the inclusion of a provision for the termination of the operation of the decree upon motion by order of the court. *See* Joint App. Vol. III, *Martin*, 109 S. Ct. 2180 (1989) (Nos. 87-1614, 87-1639, 87-1668) (LEXIS, Genfed library, Briefs file).

20. *See* Mengler, *supra* note 12, at 292, 294-309.

21. 420 U.S. 223 (1975).

22. *Id.* at 236 n.10 (1975). Professor Mengler criticizes the Supreme Court for not giving direction to federal courts on defining consent decrees. Mengler, *supra* note 12, at 309. The statement in *ITT* is but one of several different definitions of a consent decree. The Supreme Court has approached a consent decree differently depending on whether the issue before the Court is the approval, modification, or interpretation of the consent decree. *Id.* at 310.

A consent decree is analogous to a contract because it is an agreement arrived at by negotiation.[23] Although there is often no admission of liability, the consent decree is based on consideration. The minority persons end the Title VII litigation in return for the employer submitting to the requirements contained in the decree.[24] For enforcement purposes courts construe a consent decree as a contract.[25]

A consent decree is also a judicial order.[26] The court with jurisdiction over the employment discrimination suit must approve the settlement reached by the parties.[27] Further, the court has the duty to ensure that the terms of the consent decree are carried out.[28] Therefore, the court retains jurisdiction over the matter.[29] The duty of the court to continue supervision over the matter and the court's role in approving the consent decree makes it clear that a consent decree is not merely an agreement between the parties, but a final judgment of the court.[30]

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23. *See generally* Comment, *Consent Decrees and the Judicial Function*, 20 CATH. U.L. REV. 312 (1970).

24. *ITT*, 420 U.S. at 236-38, n.10 (1975); Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981); United States v. Motor Vehicles Mfrs. Ass'n of United States, Inc., 643 F.2d 644, 648 (9th Cir. 1981); Strouse v. J. Kinson Cook, Inc., 634 F.2d 883, 885 (5th Cir. 1981).

25. *ITT*, 420 U.S. at 235-36. In *ITT*, the Supreme Court addressed the issue of whether it is appropriate to look to the purpose of a consent decree in the area of antitrust litigation. *Id.* at 236-37. The Court characterized the consent decrees at issue in *ITT* as compromises between two parties both of whom had purposes in opposition to each other and both of whom gave up the judicial determination of their rights in the decision to reach a negotiated settlement. *Id.* at 236. The Court refused to allow the government to sue for violation of the consent decree based on the government's interpretation of the decree as effecting the purposes of the legislation which the government had originally attempted to enforce against ITT. *Id.* at 236-37. The consent decree was held, for purposes of interpreting its terms and determining violations under its terms, to be a contract. *Id.* at 236.

26. *See generally* Comment, *supra* note 23, at 312.

27. There are differences among courts as to the extent to which the "reasonableness" of the decree will be examined. Some consent decrees are cursorily examined. *See* United States v. City of Miami, 614 F.2d 1322, 1331 (5th Cir. 1980) ("The presence of these other interests (the interests of individuals and other organizations other than those party to the suit) prevents us, or the trial court, from taking a totally 'hands-off' attitude toward the settlement reached."); Schwarzchild, *supra* note 12, at 913.

28. Stotts v. Memphis Fire Dept., 679 F.2d 541, 557 (6th Cir. 1982).

29. *Id.* at 557; *Miami*, 614 F.2d at 1333-34.

30. *Stotts*, 679 F.2d at 557; *see ITT*, 420 U.S. at 223; United States v. Motor Vehicles Mfrs. Ass'n, 643 F.2d 644, 648 (9th Cir. 1981).

Beyond "approving" consent decrees, some federal courts have an active role in the process of settlement between parties in a Title VII suit. The procedure set up by the federal courts for the approval of a consent decree varies.[31] In most situations, before a court can approve a consent decree, notice of a fairness hearing must be given to affected non-minority persons and those persons are permitted to participate in the hearings so the court can determine the reasonableness of the decree.[32] When the federal court takes an active role in the approval of a consent decree the standard is primarily a standard of "reasonableness."[33] In part, the determination of reasonableness depends on how

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31. *See generally* Mengler, *supra* note 12.

In *Miami*, the Fifth Circuit Appellate Court contrasted the ordinary situation where the judiciary is not involved in the settlement agreement of parties with the participation of the judiciary required by the nature of consent decree settlements. *Miami*, 614 F.2d at 1330-33. In the former situation, "[i]f the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved." *Id.* at 1330. In the area of employment consent decrees, the Fifth Circuit endorsed an "intermediate" role for the trial court in determining the fairness of the settlement. *Id.* at 1331. The participation by the trial court was endorsed after examining various factors including the congressional intent to foster voluntary settlements of Title VII suits, *Id.* at 1331-32, and the potential for the waste of federal resources in obtaining the settlement where the agreement is not in some way supported by judicial approval. *Id.* at 1333.

32. *Stotts*, 679 F.2d at 551; Dennison v. Los Angeles, 658 F.2d 694, 695-96 (9th Cir. 1981); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980); EEOC v. Contour Chair Lounger Co., 596 F.2d 809 (8th Cir. 1979); EEOC v. A.T. & T., 556 F.2d 167, 173 (3d Cir. 1977) *cert. denied sub nom.* Alliance of Indep. Tel. Unions v. EEOC, 438 U.S. 915 (1978). Because the burden is on the parties to the decree to show the "reasonableness" of the settlement, the appearance of representatives of the non-minority class is not strictly required. Some courts invite the non-minority groups to appear at the hearing. *See* Schwarzchild, *supra* note 12, at 919.

33. *Stotts*, 679 F.2d at 557. A federal district court is required to take into consideration three factors in making the determination of the reasonableness of a consent decree. *Id.*

First, the court must consider whether the consent decree incorporates a fair representation of the charges in the underlying employment discrimination claim and an adequate resolution of those charges. *Id.* at 552; *see* United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C. Cir. 1977); Flinn v. FMC Corp., 528 F.2d 1169, 1172 (2d Cir. 1975)

Second, the court must consider the effect of the decree on the employment opportunities of non-minority groups. There must be an identifiable statistical disparity between the ratio of non-minority groups in the labor force and those hired, and the ratio of minority groups in the labor force and those hired. *Weber*, 443 U.S. 193, 208 (1979); *Stotts*, 679 F.2d at 552; *see also* Setser v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981) (The statistical disparity does

closely tailored the remedy is to the specific allegations of discrimination in the underlying suit.[34] The reasonableness of the decree also depends on the extent to which the decree operates to affect the employment opportunities of the non-minority laborer.[35] The court will not enter an order approving the decree when the parties have not satisfactorily shown the reasonableness of the decree to the court.[36]

B. Doctrine of Impermissible Collateral Attack

The federal courts of appeals have recognized that the operation of a consent decree may affect the rights of non-minority employees.[37] The majority of federal circuits have refused to allow these affected employees to challenge the hiring and promotion practices taken pursuant to the affirmative relief remedy.[38] This refusal has been

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not need to be sufficient in terms of making out a prima facie case of liability, but rather, it is sufficient if it reveals that there is a disparity which cannot be explained satisfactorily by the employer.).

Third, the court must also consider all objections to the decree and the alternatives available to the court and the parties. United States v. City of Miami, 614 F.2d 1332, 1334 (5th Cir. 1980).

34. The practical operation of the decree must be reasonably related to the remedy of the statistical disparity found. *See* Valentine v. Smith, 654 F.2d 503, 510-11 (8th Cir. 1981); United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980).

35. Two of the three factors stated at *supra* note 33 require the court to consider the effects of the decree on and the objections of non-minority groups. *See Miami*, 614 F.2d at 1330 (standard of approval where role of trial court is to approve the settlement agreed between parties is a finding that the "settlement is fair, adequate, and reasonable"); United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975) (trial court may only approve the settlement after determining that the terms are not unlawful, unreasonable, or inequitable).

36. *Stotts*, 679 F.2d at 557.

37. *See id.* at 552-53.

38. *See* Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 484 U.S. 301 (1988); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983) (Rehnquist, J., dissenting); *Stotts*, 679 F.2d 541; Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62 (4th Cir. 1981); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3d Cir. 1980). *But see* Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986).

The legal theory behind the refusal to allow challenges to consent decrees is not clearly defined across federal courts. Under the umbrella of "Impermissible Collateral Attack" the majority of federal courts include various legal theories. *See* Comment, *supra* note 12, at 148. The rationale behind the preclusion of challenges is more clear than the logic of the law used to support that rationale. Kramer, *supra* note 12, at 332-33; *see* Comment, *supra* note 12,

justified by reference to the "doctrine of impermissible collateral attack."[39]

The cases in which the doctrine has been implemented are procedurally similar. Minority employees file a Title VII action against their employer. The parties then negotiate a settlement—a consent decree—requiring that the employer fulfill certain hiring goals. Non-minority groups subsequently bring separate actions alleging that the employer in compliance with the decree has engaged in "reverse discrimination."[40]

The legal theories underlying the use of the doctrine of impermissible collateral attack vary.[41] There is a strong desire to protect a judgment from later inconsistent adjudications, to avoid the waste of judicial resources, and to protect the finality which should attach to a judicial determination.[42] Therefore, courts which preclude challenges to consent decrees by reference to the doctrine of impermissible attack employ principles of comity between federal courts, judicial efficiency, and *res judicata*.[43] Courts which employ the doctrine of impermissible collateral attack draw support from three policy considerations.

Allowing non-minority persons to attack the validity of the consent decree would undermine the congressional policy encouraging voluntary settlement of employment discrimination disputes.[44] A court striking

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at 148. Principles of *res judicata*, principles of comity among courts, interests in the finality of judgments, and the intent of Congress in formulating the structure of Title VII all surface in various situations to form a workable legal framework for the preclusion. *See* Kramer, *supra* note 12, at 332-33.

39. The development of this doctrine has been attributed to a line of four cases: Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982); Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); Prate v. Freedman, 430 F. Supp. 1373 (W.D.N.Y.) *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); and O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa.), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); *see generally* Comment, *supra* note 12, at 147.

40. *See* Comment, *supra* note 12, at 148-53.

41. *See supra* note 38.

42. *Prate*, 430 F. Supp. at 1375; *see also* Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893, 898 (5th Cir. 1979).

43. *Cf.* Schwarzchild, *supra* note 12, at 899. *See generally* Comment, *supra* note 12, at 154-72.

44. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the court looked to the legislative history of Title VII, 42 U.S.C. § 2000e (1986), finding that the purpose of the enactment was to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander*, 415 U.S. at 44 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). This purpose was effectuated by

at the validity of a consent decree interferes with the Title VII policy of encouraging the promotion of equal opportunity in the employment arena through voluntary settlement.[45]

Senator Humphrey, in his concluding remarks to the introduction of the Civil Rights Act of 1964, stated the Act "places first reliance on conciliation and voluntary action, and authorizes legal action only as a last resort."[46] In discussing Title VII of the Act, Senator Humphrey argued that emphasis is placed on "voluntary compliance" in pursuing the goals of equal employment opportunity.[47]

Further, Congress has set up alternative means to promote the policy of equal employment. For example, it created the Equal Employment Opportunity Commission (EEOC).[48] The availability of

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the selection of "cooperation and voluntary compliance" as the preferred means of achieving the goal of the enactment. *Alexander*, 415 U.S. at 44; *see also Dennison*, 658 F.2d at 696 (one policy of the Title VII legislation is the promotion of voluntary settlements); *Miami*, 614 F.2d at 1331-33 (Congress has placed an "extremely high premium" on the voluntary settlement of Title VII actions).

45. *See infra* notes 111-13 for a discussion of the majority opinion's rejection of this argument.

The proposition that the congressional policy favoring the voluntary settlement of employment discrimination actions does not give rise, in and of itself, to the use of the doctrine of impermissible collateral attack to immunize consent agreements from later litigated discrimination charges. To take that logical step, one must first assume that the voluntary settlement has already considered the effects of the operation of the settlement agreement on those groups not parties to the settlement. Congress cannot be said to have the intent to foster settlements which promote equal opportunity in employment where the settlement occurs without consideration of the equal opportunity rights of non-minority persons. 110 CONG. REC. 6553 (1964) (statement of Sen. Humphrey)("[Title VII] provides that race shall not be a basis for making personnel decisions"). Where the court has followed the "notice" and "hearing" procedures outlined above, *see supra* notes 31-36, the court has taken into account the objections of those groups and the effect of the operation of the settlement agreement on those groups.

46. 110 CONG. REC. 6552 (1964)(statement of Sen. Humphrey). For a discussion of the legislative history of Title VII see *Gardner-Denver*, 415 U.S. at 44-47; and Johnson v. Seaboard Air Line R.R. Co., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

47. 110 CONG. REC. 6551 (1964) (statement of Sen. Humphrey).

48. Congress created the EEOC under its authority to promote the settlement of Title VII actions. 42 U.S.C. § 2000e-4 (1986). Where the EEOC finds that there are reasonable grounds to believe that an employer is subject to the provisions of the Equal Employment Opportunities Act, the commission shall first attempt to eliminate the discrimination "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1986). The

extra-judicial means of promoting the policy of equal employment encourages employers to voluntarily pursue the goals of Title VII.[49] To provide non-minority groups with a cause of action to challenge that voluntary work asks the courts to test each voluntary equal employment plan in the adversarial process.[50] It is not clear that it was the intent of Congress to test each step toward equal employment opportunity in the courts.[51]

Allowing a party to challenge the consent decree also creates the potential threat that the employer would be subject to conflicting obligations. In *Dennison v. City of Los Angeles*,[52] two non-minority individuals sued the Los Angeles Department of Water and Power after they had been denied promotions upon successful completion of promotion examinations.[53] The non-minority plaintiffs alleged a pattern of discrimination and requested compensatory relief.[54] The Ninth Circuit Court of Appeals held the action constituted an impermissible collateral attack on the validity of an earlier consent decree.[55] The court, in refusing to allow the action to continue, reasoned, "Each time the [defendant City] attempted to comply with the affirmative action program by promoting a minority employee, it would have to give an equivalent amount of compensation to a non-minority employee who would have been promoted but for the consent decree."[56]

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creation of the EEOC, and the tools provided the EEOC in assisting the federal courts in the implementation of the policies of Title VII, support an intent to provide non-judicial alternatives, e.g., negotiated settlements, to carry out the purpose of the Act. *See* Comment, *supra* note 12, at 169.

49. It is noted in Comment, *supra* note 12, at 147, that the participation of the EEOC in promoting settlement of Title VII suits ends before a suit is filed. *Id.* at 169.

50. *See* United States v. City of Miami, 614 F.2d 1332, 1334 (5th Cir. 1980) ("If the resources of government agencies charged with enforcing anti-discrimination laws must be expended in the trial of complex factual issues in *every* case, the progress of remedying illegal discrimination is likely to slow to a snail's pace."); Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976).

51. *Miami*, 614 F.2d at 1334.

52. 658 F.2d 694 (9th Cir. 1981).

53. *Id.* at 695.

54. *Id.*

55. *Id.*

56. *Id.* In *Stotts*, the Sixth Circuit characterized the dilemma sought to be imposed upon employers after successful challenge to the employer's hiring practices under a consent decree, that is, "the City (employer) would be subject to dual obligations . . . plac[ing] the City in a 'Catch-22' position of incurring liability for employment discrimination without regard to the action['s] of the City pursuant to the consent decree." Stotts v. Memphis Fire Dept., 679 F.2d

Some courts also rely on the availability of separate Title VII actions against the employer by non-minority plaintiffs.[57] These federal courts do not allow challenges to a consent decree because of the doctrine of impermissible collateral attack, and offer as a rationale the availability to a non-minority plaintiff of a separate Title VII action.[58] Even when the non-minority plaintiff pursues a separate Title VII action, however, some courts have dismissed the suit if it arguably consists of an attack on the prior consent decree.[59]

II. *MARTIN V. WILKS*

A. Facts

In 1974, the Ensley Branch of the National Association for the Advancement of Colored People (NAACP) and seven black individuals filed separate class actions alleging violation of Title VII of the Civil Rights Act of 1964.[60] They alleged violations in the hiring and promotion practices of the City of Birmingham (Birmingham) and the Jefferson County Personnel Board (Board).[61]

The district court consolidated the cases.[62] A bench trial was conducted on the validity of the tests used to screen applicants for hire

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541, 559 (6th Cir. 1982); *see also Dennison*, 658 F.2d at 695-96; Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424, 425 n.2 (8th Cir. 1981).

57. United States v. Jefferson County, 720 F.2d 1511, 1518-19 (11th Cir. 1983). *Jefferson County* is the Eleventh Circuit Court of Appeal's review of the denial of intervention by Birmingham Firefighters Association and white firefighters in the earlier procedural stages of the *Martin* case. *See also* Firefighters v. Cleveland, 478 U.S. 501 (1986).

58. In *Prate*, although the suit by non-minority employees was brought as a separate Title VII action, because the district court construed the action as a challenge of the earlier entered consent decree, it refused to take jurisdiction over the separate action, citing the doctrine of impermissible collateral attack. Prate v. Freedman, 430 F. Supp. 1373, 1374-75 (W.D.N.Y. 1977).

59. In *Dennison*, non-minority plaintiffs pursued a Title VII action alleging "reverse" discrimination by operation of a consent decree. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of that Title VII action, rejecting the claim as "substantively, albeit not formally, an impermissible collateral attack." *Dennison*, 658 F.2d at 695.

60. 2 U.S.C. § 2000e (1986).

61. *Martin*, 109 S. Ct. at 2182-83; *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1494 (11th Cir. 1987), *aff'd sub nom* Martin v. Wilks, 109 S. Ct. 2180 (1989). In 1975, the United States brought suit alleging a pattern or practice of discrimination in several areas of public service employment. *Id.*

62. *In re Birmingham*, 833 F.2d at 1494.

in the police and fire departments.[63] The district court found Birmingham and the Board engaged in a practice of discrimination against minority groups in the use of those tests.[64] On appeal, the Eleventh Circuit affirmed the trial court's finding.[65]

On remand to the district court, a second bench trial was conducted on the issue of the liability of Birmingham and the Board in the use of other testing procedures.[66] After the trial but before judgment was entered, the parties began settlement negotiations which resulted in two consent decrees.[67] These decrees set forth a remedial scheme which provided in part long-term and interim hiring goals for black firefighters, and goals for promotions of black firefighters.[68] Each decree specifically provided that it did not constitute an adjudication or an admission of liability by the Board or Birmingham.[69]

The district court entered an order provisionally approving the decree and directed publication of upcoming fairness hearings.[70] Notice of hearings was published in two local newspapers.[71] At the

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63. *Id.*

64. In December 1976, the district court held a bench trial on the issue of the validity of entry-level tests the City and the Board used to screen applicants for fire and police department positions. The court held the tests were discriminatory in violation of Title VII. Final judgment on this issue was entered in January 1977. *Id.*

65. *Id.* (citing Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980)).

66. *Id.*

67. Birmingham and the Board each entered into a separate consent decrees with the seven black plaintiffs, the Ensley Branch of the NAACP, and the United States. *Id.*

68. *Martin*, 109 S. Ct. at 2183.

> Paragraph 5 of the City of Birmingham decree provided, in relevant part: In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification . . . in percentages which approximate their respective percentages in the civilian labor force of Jefferson County . . . .

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For blacks, the percentage goal was 28%. *Id.* The decree provided that upon motion by any party after six years from the entry of the decree the court had the authority to dissolve the decree. *Id.*

69. *In re Birmingham*, 833 F.2d at 1494.

70. *Martin*, 109 S. Ct. at 2183.

71. *Id.*; Reply Brief for Petitioner John W. Martin, et al., *Martin*, 109 S. Ct. 2180 (1989) (Nos. 87-1614, 87-1639, 87-1668) (LEXIS, Genfed library, Briefs file).

hearing, the Birmingham Firefighters Association (BFA) appeared and filed objections as *amicus curiae*.[72] After the hearing, the district court approved the decrees.[73]

A new group of white firefighters, the *Martin* respondents,[74] then brought suit in the district court alleging that Birmingham and the Board "were engaged in a practice or pattern of discrimination and were intentionally favoring blacks over whites."[75] In their answers, Birmingham and the Board admitted to race conscious decision-making, but argued that the consent decrees required those decisions,[76] and therefore, no liability could attach.[77]

The defendants Birmingham and the Board moved to dismiss the suit as an impermissible collateral attack on the consent decrees.[78] The district court found that the *Martin* respondents were bound by the consent decrees.[79] The district court ruled the consent decrees would provide a defense to liability if it were found at trial that the consent decrees required the actions taken.[80] After trial, the district court granted the Board's motion to dismiss and entered an order in favor of Birmingham.[81] The court found that the *Martin* respondents failed to show that the defendants had violated the terms of the consent decrees.[82]

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72. *Martin*, 109 S. Ct. at 2183.

73. *Id.* The order approving the decrees was entered on August 18, 1981. The district court concluded,

> whether or not the proposed decree would in each instance correspond to some finding of discrimination which this court might make . . . is not the question. The settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy.

In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1495 (11th Cir. 1987).

74. This group of firefighters is referred to in the opinion as the Wilks respondents. *Martin*, 109 S. Ct. at 2183.

75. *In re Birmingham*, 833 F.2d at 1495.

76. *Id.* at 1496.

77. *Martin*, 109 S. Ct. at 2183. Because the defendants put in issue the consent decrees, the district court was squarely faced with the issue of the separate Title VII action as a challenge to the consent decrees.

78. *Martin*, 109 S. Ct. at 2183.

79. *In re Birmingham*, 833 F.2d at 1492.

80. *Martin*, 109 S. Ct. at 2183.

81. *In re Birmingham*, 833 F.2d at 1497.

82. *Martin*, 109 S. Ct. at 2183-84. According to the Court of Appeals, the trial court held:

> [t]he plaintiffs had failed in their effort to show a violation of . . . the [Birmingham] decree. In fact, the court expressly found that

On appeal, the Eleventh Circuit found that the district court had erred in deciding that the defendants were bound by the consent decree.[83] The court found that the *Martin* respondents were not parties or in privy to a party and, therefore, the *Martin* respondents were not bound by the consent decrees.[84] The panel specifically rejected the doctrine of "impermissible collateral attack."[85] It rejected the doctrine "to the extent that it deprives a non-party to the decree of his day in court to assert the violation of his civil rights."[86] The court also determined that the policy of encouraging voluntary settlements "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."[87] The case was remanded with suggestions for trial of the discrimination claims.[88] Birmingham and the Board appealed to the Supreme Court.

B. Holding

Chief Justice Rehnquist, writing for a five member majority, affirmed the Eleventh Circuit.[89] The majority characterized the issue facing the Court as whether, in the area of civil rights litigation, there should be a mandatory intervention rule.[90] Birmingham and the Board argued that because the *Martin* respondents were aware that "the underlying suit might affect them," their failure to intervene should

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> [Birmingham] "*does not use* a job-related selection procedure in evaluating the qualifications of certified candidates [and] has made no effort to develop . . . such a procedure." Thus, the court in effect held that [Birmingham] had unilaterally foreclosed the plaintiffs from establishing a violation of [the decree]: since [Birmingham] did not use a job-related selection procedure, the court apparently reasoned, [the decree] imposed no obligations on it. Having thus disposed of the issue whether [Birmingham] had violated [the decree], the court did not decide the plaintiffs' Title VII and equal protection claims.

In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1497 (1987).

83. *In re Birmingham,* 833 F.2d at 1497.

84. *Id.* at 1500.

85. *Id.* at 1498.

86. *Id.* (citing United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983)).

87. *Id.*

88. *Id.* at 1500; *Martin,* 109 S. Ct. at 2184. *See infra* notes 189-216 and accompanying text for a discussion of the suggestions for trial of the "reverse discrimination" action.

89. *Martin,* 109 S. Ct. at 2184.

90. *Id.* at 2185.

preclude them from relitigation of the issues in a new action.[91] The Court held that the protection of a prior judgment should be accomplished through the system of joinder of parties under Rule 19 of the Federal Rules of Civil Procedure.[92] As a result, the opinion stands as a rejection of the doctrine of impermissible collateral attack, and a reversal of the trend in the federal circuits.[93]

The Court held that "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."[94] The majority recognized that a duty to intervene is necessary to the doctrine of impermissible collateral attack.[95] Because the relief in a consent decree is affirmative relief, a logical consequence of granting the relief is that the rights of other persons will be affected.[96] Non-minority job applicants will be able to sue for the protection of affected rights in later actions unless they are bound by the judicial determination. They cannot be bound as nonparties unless their failure to intervene is said to bind them.[97]

If a plaintiff wishes to have persons bound by a judgment or decree, the plaintiff is obligated to make those persons parties to the action.[98] In 1934, in *Chase National Bank v. Norwalk*,[99] the Supreme Court held that "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered . . . will not affect his legal rights."[100] Rule 19 provides the mechanism to insure that all parties necessary for just adjudication are joined in a single

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91. *Id.*

92. *Id.* at 2186. One practical effect of the judgment, however, is that the judgment of a past pattern of discrimination of the minority parties and the judgment of a pattern or practice of "reverse" discrimination against the non-minority parties both may remain valid. The entity originally charged with violating Title VII suffers multiple obligations because of inconsistent judgments. It would be that entity, the employer, which would desire to join all affected parties, as a means of protecting against multiple obligations. In *W.R. Grace & Co. Rubber Workers*, 461 U.S. 757 (1983), the Supreme Court was not sympathetic to the possibility of inconsistent obligations imposed on the employer. *Id.* at 767. The Court stated, "The dilemma was of the Company's own making." *Id.*

93. *Martin*, 109 S. Ct. at 2187.

94. *Id.* at 2186.

95. *Id.*

96. *Id.* at 2187.

97. *Id.* at 2186.

98. *Id.* at 2185 ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined").

99. 291 U.S. 431 (1934).

100. *Id.* at 441.

lawsuit.[101] The parties to a Title VII action must use the system of joinder provided in Rule 19 to bind persons to the outcome of that litigation.[102] The *Martin* respondents were not parties to the earlier action, therefore, they were not bound by that judgment.[103]

Rule 19 is a compulsory joinder rule in that it requires certain parties to be joined. Parties who are not joined under Rule 19 may intervene under Rule 24.[104] Rule 24 does not provide for the mandato-

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101. The relevant portions of Rule 19 provide:

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(a), (b).

102. *Martin*, 109 S. Ct. at 2187.

103. *Id.* at 2184.

104. Rule 24 states, in pertinent part:

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that

ry intervention of parties. The rule is phrased in permissive terms revealing the drafters' intent to allow for a mechanism permitting individuals to join an action.[105] This intervention rule is not to be replaced by a system of notice and duty to intervene. The compulsory joinder rule best accomplishes the goal of finality in judgments by ensuring that those persons whose interests will be affected are bound by the outcome of the litigation.[106]

The system of mandatory joinder created by Rule 19 properly places on the parties already in the lawsuit the burden of identifying persons who will suffer effects from the entry of judgment: "The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted."[107] The plaintiff in an action is better acquainted with the "scope" of the relief sought than persons not party to the action.[108] It follows, therefore, that the plaintiff is better able to identify potentially affected third-parties.[109] A mandatory intervention rule would shift

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the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(a),(b).

105. *Martin*, 109 S. Ct. at 2185.

106. *Id.* at 2185 (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4452 (1981)).

107. *Id.* at 2186.

108. *Id.* at 2187.

109. *Id.* at 2186. The majority distinguished a case cited by Birmingham and the Board in which mandatory intervention was upheld. *Id.* Penn-Central Merger and N & W Inclusion Cases, 390 U.S. 102 (1968), was distinguished as unique in that it involved the "extraordinary nature of the proceedings challenging the merger of giant railroads." *Martin*, 109 S. Ct. at 2187. Birmingham and the Board also cited Provident Tradesmens Bank & Trust Co. v. Patterson, 389 U.S. 486 (1968), for the proposition that there existed a mandatory intervention rule. *Martin*, 109 S. Ct. at 2186. The majority noted

the burden of identifying affected parties to the "less able shoulders" of the non-parties.[110]

The Court addressed the possibility that an adverse decision would frustrate the congressional policy favoring the voluntary settlement of employment discrimination cases.[111] The Court noted that regardless of any congressional policy favoring settlements, the consent decree entered into between parties could not "possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement."[112] Further, the system of mandatory joinder is as likely to promote settlement among parties to an action as the mandatory intervention system invoked by Birmingham and the Board.[113]

The Court also rejected the contention that "the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation."[114] The Court stated that Rule 19 is designed "to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways."[115] The problems in identification arise primarily from the "nature of the relief sought and not because of any choice between mandatory joinder and intervention."[116] Rule 19 provides means to shape the "breadth of a lawsuit and concomitant relief" so that parties "avoid needless clashes with future litigation."[117]

C. The Dissent

The dissent's analysis focused on the concern of the district court that the earlier order be final, settling the obligations of Birmingham and the Board on the issue of discriminatory hiring and promotion practices.[118] To insure the finality of the consent decrees, however,

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that the *Provident Bank* Court had expressly left open the question "whether preclusive effect might be attributed to a failure to intervene;" there was no mention of Rule 19 and 24 in the text of *Penn-Central*. *Id.* at 2187 (citing *Penn-Central*, 390 U.S. at 114-15).

110. *Martin*, 109 S. Ct. at 2187.

111. *Id.* at 2187-88.

112. *Id.* at 2188.

113. *Id.*

114. *Id.* at 2187. For a discussion of the potential burden to future Title VII plaintiffs under the *Martin* decision, see *infra* notes 164-171 and accompanying text.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 2201 (Stevens, J., dissenting).

the dissent's analysis suggests that the *Martin* respondents, although not parties or privy to parties in the earlier suit, are bound by that order.[119] The majority opinion, in contrast, sacrificed a concern for finality to avoid ruling that the *Martin* respondents are bound to a judgment in which they were neither parties nor in privy with parties.[120]

The dissent's argument made a distinction between parties bound by an earlier judgment and parties whose interest is "as a practical matter . . . impaired by the outcome of [the] case."[121] The dissent argued that it is not unfair that a party who has chosen to "remain on the sidelines" has its interests affected.[122] It is well accepted that although the interests of that party are affected, the legal rights of that party remain unaffected.[123] In *Martin*, the legal rights of the *Martin* respondents are affected in that the *Martin* respondents have a legal right to freedom from discriminatory employment practices under Title VII.[124] The merits of a cause of action based on those legal rights can be litigated in a separate action.[125]

Yet, the dissent argued against allowing the *Martin* respondents to continue their Title VII action. As a practical matter, the *Martin* respondents' interests in non-discriminatory employment practices are affected.[126] Granting the right to pursue a cause of action which puts in issue the propriety of the consent decrees gives the *Martin* respondents an opportunity to litigate the order approving the consent decrees on the merits.[127] The dissent construed litigating the propriety of the order approving the consent decrees as an appeal of the order.[128]

The dissent maintained that the *Martin* respondents, as non-parties, can only collaterally attack the judgment, and in that case, there is a limitation on the grounds on which they can base that attack.[129] A collateral attack of a prior judgment is limited, as to non-

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119. *Id.* at 2186 n.6.

120. *Id.* at 2185; *cf.* Ashley v. City of Jackson, 464 U.S. 900, 901-02 (1983) (Rehnquist, J., dissenting) ("I find myself at a loss to understand the origins of the doctrine of '[impermissible] collateral attack' employed by the lower courts . . . to preclude a suit brought by parties who had no connection with the prior litigation.").

121. *Id.* at 2188 (Stevens, J., dissenting).

122. *Id.* at 2189-90 (Stevens, J., dissenting).

123. *Id.* at 2190 (Stevens, J., dissenting).

124. *Id.* at 2200 (Stevens, J., dissenting).

125. *Id.* (Stevens, J., dissenting).

126. *Id.* (Stevens, J., dissenting).

127. *Id.* at 2189 (Stevens, J., dissenting).

128. *Id.*

129. The dissent noted that there are limited circumstances in which a

parties prosecuting an appeal, to a challenge of the subject matter jurisdiction of the court or a claim that the earlier judgment was procured by fraud or collusion.[130] The impairment of their interests cannot be used to effectively appeal the earlier judgment.[131] The dissent viewed the majority opinion as granting a right to appeal the earlier judgment based on the mere impairment of rights.[132]

III. EMPLOYMENT DISCRIMINATION SUITS AFTER *MARTIN*

A. Joinder of Parties

The *Martin* decision states that non-minority persons must be joined in future Title VII actions.[133] The opinion stands for the proposition that the right of equal opportunity in employment for minorities is not superior to due process rights. This proposition is enforced by application of the compulsory joinder provisions of Rule 19 to the facts of the *Martin* case.[134]

The provisions of Rule 19 mandate the identification and joinder of interested groups.[135] The provisions of Rule 19 can be analyzed as a mechanism through which the court and the parties to an action can determine whether an action should proceed as brought or whether there needs to be additions to the named parties.[136] The determination that there are interests which need to be represented in the action is a recognition that the outcome of the action may affect nonparties.

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judgment can be attacked in a collateral proceeding. Unless one is a party to the action and has perfected a timely appeal, the grounds upon which an appeal challenging the judgment are a challenge to the subject matter jurisdiction of the court, or a challenge to the validity of the earlier judgment on the grounds that it was based on "corruption, duress, fraud, collusion, or mistake." *Id.* The *Wilks* plaintiffs sought to sue on their rights in a manner that attacks the earlier judgment in a proceeding which does not reflect the narrow grounds allowed for collateral proceedings. The dissent characterizes the argument of the *Wilks* plaintiffs in their action as alleging "that somewhat different relief would have been more appropriate than the relief that was actually granted." *Martin*, 109 S. Ct. at 2198 (Stevens, J., dissenting).

130. *Id.* at 2189.

131. *Id.*

132. *Id.*

133. *Id.* at 2187.

134. *See id.* at 2185-86; *see also supra* notes 89-117 and accompanying text.

135. FED. R. CIV. P. 19(a),(b); for the text of Rule 19(a) and (b) see *supra* note 101.

136. *See* J. FRIEDENTHAL, M. KANE, AND A. MILLER, CIVIL PROCEDURE § 6.5 at 336 (1985) [hereinafter FRIEDENTHAL].

Rule 19 requires the joinder of "necessary" parties to an action.[137] "Necessary" is a conclusion based on the consideration of three different types of interests involved in every lawsuit: the interest of the nonparty to be free from the impairment of a legal interest, the interest of the parties to the action to be free from inconsistent obligations arising out of later suits, and the interest of the judicial system in providing complete and final relief to the parties in the action.[138] Under the structure of Rule 19(a), if any of these interests are present the nonparty must be joined to the action.[139]

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137. *Id.* at 335; *see* 7 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1604 (1986). The text of the present Rule 19 does not contain the word "necessary;" however, "necessary" remains helpful in analysis of the issues involved in the joinder of parties for just adjudication.

138. In *Provident Tradesmens Bank*, 390 U.S. 102, the Supreme Court identified four interests relevant to the question of joinder under Rule 19:

> First, the plaintiff has an interest in having a forum. . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. . . . Third, there is the interest of the outsider whom it would have been desirable to join. . . . Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

Id. at 109-111.

A similar analysis is proposed by Professors Friedenthal, Kane and Miller, a Rule 19 question is addressed by answering three questions:

> (1) In the absence of joinder, can complete relief be accorded those already parties to the action? (2) Will a judgment in the absence of the nonparty as a practical matter impair that individuals's interest in the subject matter of the action? and (3) Will those already parties be subject to a substantial risk of incurring inconsistent obligations in separate suits?

FRIEDENTHAL, *supra* note 136, § 6.5, at 338.

139. The three interests identified correspond to the considerations provided for in the language of Rule 19(a). The interest of the nonparty to be free from the impairment of a legal interest is provided for by subsection (2)(i): "[T]he [nonparty] claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the [nonparty's] absence may . . . as a practical matter impair or impede the [nonparty's] ability to protect that interest . . . ." FED. R. CIV. P. 19(a)(2)(i).

The interest of the parties to the action to be free from inconsistent obligations arising out of later suits is provided for by subsection (2)(ii):

> "[T]he [nonparty] claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the [nonparty's] absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a)(2)(ii).

To decide whether non-minority persons are "necessary" parties to a Title VII action, the *Martin* court looked to the impairment of the non-minority persons' interests from the outcome of the action.[140] The due process right of non-minority persons to be free from the impairment of job opportunities which result from the outcome of a Title VII action is sufficient to require the joinder of the non-minority person in the Title VII action.[141]

The *Martin* majority criticized the federal courts for not identifying what is an obvious Rule 19 question.[142] Rule 19 must be applied in a Title VII action when an affirmative action plan is a requested or a potential outcome of the action.[143] The non-minority groups have a legal interest in the outcome of the traditional litigated Title VII action and in the outcome of settlement negotiations between parties to the suit.[144]

Relief which sets out hiring and promotion goals to be fulfilled by an employer affects the interests of non-minority employees.[145] The federal courts consistently have recognized this effect on non-minority employees.[146] When a consent decree is involved, the fairness hearing procedures set up by federal courts point to a court's recognition that non-minority persons are affected by the outcome of the original Title VII action.[147] The existence of those interests was an impetus for the doctrine of impermissible collateral attack.[148] Rule 19(a) mandates the joinder of a person who has a legal interest and is so situated to the

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The interest of the judicial system in providing complete and final relief to the parties in the action is provided for by subsection (1): "[I]n the [nonparty's] absence complete relief cannot be accorded among those already parties . . . ." FED. R. CIV. P. 19(a)(1).

140. *Martin*, 109 S. Ct. at 2186-87; FED. R. CIV. P. 19(a)(2)(i).

141. *Martin*, 109 S. Ct. at 2184-85; *see* Cooper, *supra* note 12, at 174-76.

142. *Martin*, 109 S. Ct. at 2185; *see also* Ashley v. City of Jackson, Miss., 464 U.S. 900, 901-02 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of rehearing) ("I find myself at a loss to understand the origins of the doctrine of '[impermissible] collateral attack' employed by the lower courts in this case to preclude a suit brought by parties who had no connection with the prior litigation.").

143. *Martin*, 109 S. Ct. at 2187.

144. *Id.*

145. *Id.* at 2189 (Stevens, J., dissenting); *see* Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 114.

146. *See Stotts*, 679 F.2d at 552-53; *Miami*, 614 F.2d at 1331.

147. *See supra* note 33, detailing the interests to be evaluated by the federal court in a fairness hearing.

148. *See* United States v. City of Miami, 614 F.2d 1332, 1331 (5th Cir. 1980); Stotts v. Memphis Fire Dept., 679 F.2d 541, 552-53 (6th Cir. 1982).

disposition of the action that the action "may . . . as a practical matter impair or impede the [nonparty's] ability to protect that interest."[149]

B. The Circular Application of Rule 19

The Title VII goal of furthering equal employment opportunity for minority persons must yield to the due process rights of other employees. The application of the compulsory joinder provisions to the facts of *Martin v. Wilks* accomplishes this result.[150] An unsettling side-effect to the application of Rule 19 to this fact set, however, is the revelation of circularity in the structure of Rule 19.

In *Martin*, the *Martin* respondents are described as persons to be joined for the just adjudication of a Title VII suit.[151] Because the *Martin* respondents were denied an opportunity to participate as parties in the original Title VII action, the Supreme Court decided that they retained a right to pursue their own Title VII action against Birmingham and the Board.[152] Thus, the Supreme Court affirmed the Eleventh Circuit's remand for trial of the non-minority plaintiffs Title VII claims.[153]

The *Martin* respondents, because they have a right to pursue their Title VII action on remand in the district court, do not have their legal interests impaired by the outcome of the original Title VII action.[154] The defendants Birmingham and the Board cannot preclude the *Martin* respondents from pursuing the Title VII action.[155] Therefore, the outcome of the original suit does not "as a practical matter impair or impede" the legal interests of the *Martin* respondents.[156]

Yet, *Martin* also stands for the proposition that non-minority plaintiffs are "necessary" parties.[157] "Necessary" is a conclusion reached about the nature of a person's interest in pending litigation.[158] A person cannot be a necessary party if that person does not have an interest which is impaired by the outcome of the pending litigation.[159]

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149. FED. R. CIV. P. 19(a)(2)(i).

150. *See Martin*, 109 S. Ct. at 2185-85; *supra* notes 89-117 and accompanying text.

151. *Martin*, 109 S. Ct. at 2187.

152. *Id.* at 2188.

153. *Id.*

154. *Id.* at 2188-89 (Stevens, J., dissenting).

155. *Id.* at 2188.

156. *See* FED. R. CIV. P. 19(a)(2)(i).

157. *Martin*, 109 S. Ct. at 2187.

158. *See supra* notes 137-39 and accompanying text.

159. Further, a person cannot be adjudged a "necessary" party where the person's interest is not sufficient to prevent courts from according complete relief

This application of Rule 19 as interpreted by the *Martin* court has the potential to affect the entire field of civil litigation. Persons who are not joined in an action are not "necessary" parties.[160] The respondents in *Martin* are an example of persons not "necessary" for the just adjudication of the original action. The *Martin* respondents are not "necessary" in that they are able to protect their legal interests in a separate Title VII action. Further, these plaintiffs are not bound by the original action.[161]

If these plaintiffs have an interest which was impaired by the outcome of the original action, then they can argue successfully that they should have been joined. The *Martin* respondents should have been joined.[162] If a plaintiff should have been joined, that plaintiff can argue for a remedy in the form of a right to sue in an action which attacks the judgment obtained in the original action. The *Martin* respondents have obtained from the Supreme Court an acknowledgement of their right to sue in a separate action.[163] It cannot be denied that the separate action, if successful, will affect the operation of the earlier entered consent decrees.

C. *The Extent of the Burden of Joining Interested Parties*

Martin provides that a person not party or privy to a party in the underlying Title VII action cannot be bound by that action. Non-minority employees must be joined.[164] There is a further pool of interests represented by other minority persons which must be joined in future Title VII litigation.[165] The *Martin* decision provides an

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among the named parties to the action. Nor can a person be adjudged a "necessary" party where the person's interest is not the type of interest which if sued upon in later litigation might subject the parties to the action to inconsistent obligations. *See supra* notes 138-39.

160. If they are "necessary" parties, they must be joined by operation of the compulsory joinder provisions of Rule 19.

161. *Martin*, 109 S. Ct. at 2185.

162. *Id.* at 2186.

163. *Id.* at 2188.

164. *Id.* at 2186.

165. The *Martin* decision does not address the interests of other minority groups in a Title VII action pursued by a representative of a particular minority group. However, in applying the compulsory joinder provision of Rule 19 to Title VII actions, the implication is that all interested parties must be joined. The argument for joinder of all interested parties, including other minority groups, is in keeping with the compulsory joinder of all those at "whose expense . . . relief might be granted." *Id.* at 2186. Hispanic male employees no less than white male employees would be affected by the operation of a consent decree between African-American male employees and the employer. *See*

opportunity for all persons not joined in the original action, whose interests are affected by the operation of the consent decree, to indirectly challenge the operation of that consent decree.[166] When the consent decree provides employment goals for attaining a certain percentage of a particular minority participation in the workforce, the hiring practices under that decree cannot avoid affecting the employment interests of all other employees.[167] The employer hires from the minority class represented in the consent decree[168] and because the goal must be reached by a certain time, the employer must engage in disproportionate hiring from that class. The disproportionate hiring practice will necessarily affect the interests of other minority persons. The implication is that the Title VII plaintiff must identify and join a large body of interests to insure the practical finality of the judgment attained.

Joinder of persons presents another problem in a Title VII action. Under Title VII, a court has discretion to allow "the prevailing party . . . a reasonable attorney's fee."[169] This provision was added to enable the discriminated employee to pursue a Title VII action by providing an incentive to the attorney to take the employee client.[170] Under the joinder provisions, the joined party is made a defendant to an action.[171] A party who is participating in the lawsuit to protect the potential impairment of equal employment rights logically would join as a defendant. The difficulty involves providing all of the joined employees with resources to obtain an attorney when the fee for that attorney is contingent on prevailing in the action.

D. The Role of Non-Minority Persons in Settlement Negotiations

The *Martin* decision fails to take into account the potential role of a non-minority person once that person is joined in a Title VII action. The *Martin* decision concentrates on the due process rights of the non-minority person.[172] The majority was unpersuaded by the policy of

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Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. INDUS. & COM. L. REV. 495, 512-13 (1966).

166. *Martin*, 109 S. Ct. at 2185.

167. *See* Walker, *supra* note 165, at 516.

168. *See id.* at 516.

169. 42 U.S.C. § 2000e-5(k) (1986).

170. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 104 (1972); Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 259 (1964).

171. *See* FRIEDENTHAL, *supra* note 136, § 6.4, at 329-34.

172. *Martin*, 109 S. Ct. at 2185.

fostering equal opportunity in employment.[173] The majority opinion implies that a more satisfactory way of handling fact situations such as that presented in *Martin* is to litigate the merits of every Title VII action, thus avoiding the problems created by consent decrees altogether.[174]

It has been recognized that non-minority persons once joined to the Title VII action could force litigation of the suit.[175] In *Local Number 93, International Association of Firefighters v. City of Cleveland,*[176] representatives of non-minority employees intervened in the Title VII action of a minority class.[177] The issue before the court was whether the district court was prevented under Title VII from approving a consent decree which required the hiring of certain individuals.[178] The Supreme Court held that consent decrees are not within Title VII's prohibitions against ordering affirmative relief by ordering the hiring of certain individuals.[179] The non-minority representative had participated in the negotiations that resulted in the consent decree, but refused to agree to the decree.[180] The Supreme Court held that "while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent."[181] The Court went on to say that the non-minority represen-

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173. *Id.* at 2187.

174. *Id.* The majority rejected the arguments by Birmingham and the Board that procedures could be set up to preserve the role of consent decrees in furthering the policy of Title VII legislation. The majority was unwilling to accept the challenge, stating "acceptance . . . would require a rewriting rather than an interpretation of the relevant Rules." *Id.* The opinion continues, "we are not persuaded that . . . acceptance would lead to a more satisfactory method of handling cases like this one." *Id.* This last statement implies that the majority of the Supreme Court would prefer testing each employment discrimination claim in litigation.

175. Kramer, *supra* note 3, at 352-56; *see* Local 93, Int'l Assn. of Firefighters v. City of Cleveland, 478 U.S. 501, 530 (1986).

176. 478 U.S. 501 (1986).

177. *Id.* at 3067. The representative, Local Number 93 of the International Association of Firefighters intervened as party plaintiff. *Id.*

178. *Id.* at 3070.

179. *Id.* at 3071. The non-minority representative had argued that 42 U.S.C. §§ 2000e-5(g) prohibited the district court from entering the order approving the consent decree because § 2000e-5(g) provides that "no order of the court shall require . . . hiring, reinstatement, or promotion of an individual as an employee." *Id.* (citing 42 U.S.C. 2000e-5(g) (1986)).

180. *Local 93,* 478 U.S. at 3068.

181. *Id.* at 3079 (citing for support Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Kirkland v. New York State Dept. of Correctional Servs., 711

tative could succeed in blocking the consent decree's approval if it based the refusal to agree on "valid claims."[182]

The inability of the non-minority intervenor to block the entry of the consent decree in *Local 93* does not reflect the probable outcome of Title VII actions after *Martin*. The decision in *Martin* recognizes the due process right of the non-minority person to be joined in a Title VII action.[183] Although the majority opinion does not explicitly connect that due process right to an identifiable legal interest to be protected,[184] the right to participate must involve the existence of a legal interest to be defended.[185] One commentator suggests that the existence of a non-minority defendant in the Title VII action would create a trilateral action and the focus of the issues would be on the allocation of a limited pool of employment positions between the minority plaintiff and the non-minority defendant employee.[186] In this scenario, the right of the non-minority party to those positions would be essentially the same as the right of the minority persons.[187]

IV. OPERATION OF CONSENT DECREES AFTER *MARTIN*

The *Martin* decision affects the validity of consent decrees presently relied upon by employers. In both the majority opinion and the opinion of the Eleventh Circuit, an issue was the effect the trial court had given the consent decree at trial.[188] That issue was not presented for

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F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)).

182. *Id.* at 3079.

183. *Martin*, 109 S. Ct. at 2185.

184. Rather, the due process right is discussed in terms of a right to be heard.

185. If one has no legal interest to be affected in a suit, certainly, one has no due process right to be joined under the compulsory joinder provisions of Rule 19.

186. Laycock, *supra* note 12, at 109.

187. *Id.*

188. *Martin*, 109 S. Ct. at 2186; *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1497 (1987). The trial at the district court level was centered around the issue of whether Birmingham and the Board had acted in accordance with the consent decrees in the hiring and promoting practices they had pursued. *Id.* Specifically, the trial court focused on paragraph 2 of the City consent decree, which provides:

> Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person, who is not qualified, or to hire, transfer, or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

Id.

review by the Supreme Court.[189] The role played by a consent decree in a non-minority Title VII action is a question left to the district courts. There are several possible roles for a prior entered consent decree to play in a "reverse" discrimination Title VII action.

At the trial level, the consent decrees were a defense to the charge of discrimination by the *Martin* respondents. The decrees were examined to determine if Birmingham and the Board were required to make the promotions which the *Martin* respondents alleged were discriminatory conduct.[190] The district court recognized that the injury suffered by the *Martin* respondents arose by operation of the consent decrees. According to the district court, Birmingham and the Board escaped liability for the injury of the minority groups by following the mandate of the consent decrees.[191] If they could not escape liability for the injury of the non-minority groups by following the requirements of the consent decrees, Birmingham and Board would be liable, in effect, for compliance with the order of the district court. Thus, one possible role for an earlier entered consent decree in a "reverse" discrimination action is the use of the consent decree as a "good faith" defense to liability.

The Eleventh Circuit Court of Appeals suggested that the consent decree should be analyzed using the standard set out by the Supreme Court for determining the validity of voluntary affirmative action plans.[192] In *Johnson v. Transportation Agency*,[193] the Supreme Court ruled on the validity of a voluntary affirmative action plan instituted by the Santa Clara County Transportation Agency.[194] A male employee challenged that plan after he had been denied a promotion in favor of a marginally less qualified female.[195] The Court held that the burden of proving discrimination is on the non-minority

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The focus on the issue of Birmingham and the Board's compliance with this paragraph of the consent decree, rather than the merits of the *Wilks* plaintiffs' charge of discrimination, gave rise to the conclusion by the Eleventh Circuit, and the majority of the Supreme Court, that the district court "treated the plaintiffs as if they were bound by the consent decrees." *Id.* at 1496; *see Martin*, 109 S. Ct. at 2186 n.6. ("if [the consent decree] is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being 'bound' by the decree").

189. Brief of Respondents Robert K. Wilks, et al., *Martin*, 109 S.Ct. 2180 (1989) (Nos. 87-1614, 87-1639, 87-1668) (LEXIS, Genfed library, Briefs file).

190. *In re Birmingham*, 833 F.2d at 1496-97.

191. *Martin*, 109 S. Ct. at 2184.

192. *In re Birmingham*, 833 F.2d at 1500-01.

193. 408 U.S. 616 (1987).

194. *Id.* at 1446.

195. *Id.* at 1448.

plaintiff when an employer has defended the hiring actions by reference to an affirmative action plan.[196] The plaintiff must show that the plan was not "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of [the minority group] in 'traditionally segregated job categories.'"[197] The plaintiff also must show that the rights of nonminorities are "unnecessarily trammel[ed]."[198] The plaintiff may satisfy the burden of proving this second element by showing that the affirmative action plan is a pretextual justification relied on by the employer.[199] This may be shown by pointing to requirements in the plan such as the discharge of nonminorities to provide jobs for the minorities, or by pointing out that the plan represents an absolute bar to the advancement of the nonminorities.[200] An earlier entered consent decree is construed as a voluntary affirmative action plan for the purposes of a "reverse" discrimination action, and could be evaluated accordingly.

The Supreme Court did not have before it the issue whether the *Johnson* standard was the appropriate means to evaluate a "reverse discrimination" action.[201] On remand, the district court will apply the *Johnson* standard for trial of the *Martin* respondents' claims.[202] There are other ways to frame the issue of the consent decree's role in a "reverse discrimination" action.

The majority opinion in *Martin* stated that "the proceedings in the District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree."[203] As a practical matter, the

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196. *Id.* at 1449.

197. *Id.* at 1452 (citing United Steelworkers v. Weber, 443 U.S. 193, 197 (1979)). *Weber* addressed the question of whether the instigation of a voluntary affirmative action plan was prohibited by Title VII. *Weber*, 443 U.S. at 197. The Court held that voluntary affirmative action was not prohibited stating,

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204 (quoting 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey)).

198. *Johnson*, 107 S. Ct. at 1451.

199. *Id.* at 1449.

200. *Id.* at 1451 (citing *Weber*, 443 U.S. at 208).

201. Brief of Respondents Robert K. Wilks, et al., *Martin*, 109 S. Ct. 2180 (1989) (Nos. 87-1614, 87-1639, 87-1668) (LEXIS, Genfed library, Briefs file).

202. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500 (1987).

203. *Martin*, 109 S. Ct. at 2188.

consent decree was the guide by which the allegedly discriminatory hiring and promotion practices were conducted. The majority pointed out that the trial proceeded with the assumption that the defendants Birmingham and the Board could escape liability for discriminatory employment practices if it was found they complied with the requirements of the consent decrees.[204] Therefore, the opinion suggests that the allegedly discriminatory practices should be examined without reference to the consent decrees.[205] This implies then that defendants may have to defend the consent decrees under a standard more strict than the *Johnson* test. Perhaps even the original determination of the propriety of the decrees themselves will be the focus of the issues litigated at trial. An earlier entered consent decree could be irrelevant in a "reverse" discrimination action; a "reverse" discrimination action could be tried without reference to any existing affirmative action plan.

The issues of a "reverse" discrimination claim also could be examined under the framework suggested by the Fifth Circuit in *United States v. City of Miami.*[206] In *Miami,* the court affirmed the trial court's entry of an order approving a consent decree.[207] The opinion discussed the standard of approval applicable for settlement agreements in other areas of the law.[208] The trial court must examine the settlement to insure that its terms "are not unlawful, unreasonable, or inequitable."[209] The standard espoused by the court in *Miami* is

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204. *Martin,* 109 S. Ct. at 2186.

205. In footnote six, Rehnquist states "either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to [the *Wilks* plaintiffs'] Title VII claims or it is not." *Id.* at 2186 n.6. Because the majority decides that the *Wilks* plaintiffs are not bound by the decree, the fact that the employment decisions are made pursuant to the decrees is not a defense to the charges of discrimination. The reasons for the employment decisions must be examined under all the circumstances, including perhaps, the original impetus to entering into the consent decrees. This last amounts to a re-evaluation of the original claims of the minority plaintiffs and the negotiations which led to settlement.

206. 614 F.2d 1322 (1980), *modified in part,* 664 F.2d 435 (5th Cir. 1981).

207. *Id.* at 1342.

208. *Id.* at 1330. The opinion noted first that the approval by a trial court of a settlement agreement between parties occurred only where "by statute or rule [the court is required] to approve a settlement to which the parties to the litigation have agreed." *Id.* "The three most prevalent examples of this are proposed class action settlements, proposed shareholder derivative suit settlements, and proposed compromises of claims in bankruptcy court." *Id.*

209. *Id.* (citing for reference United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975)). The opinion states that the standard is the same although some courts have phrased it negatively, as quoted, and some have stated it positively: "the trial court must find that the settlement is fair, adequate, and

essentially the test for approval used by federal courts in "fairness" hearings.[210] The *Miami* court would require a less active role in examining the settlement when the EEOC or the Justice Department is a party to the original agreement.[211] The *Miami* test would impose a burden on the plaintiff in the "reverse discrimination" action to show that the consent decree is unlawful because it is inequitable, unreasonable, or unlawful. Under this test, the elements of the Title VII action still must be met. This standard is less strict than the *Johnson* test.

In *Martin,* the dissent's main concern was the finality which should attach to the prior judgment of the trial court.[212] The dissent noted that the "type of race-conscious relief ordered in the consent decree is entirely consistent with this Court's approach to affirmative action."[213] The dissent would allow the *Martin* respondents a cause of action to pursue their Title VII claims, but limit the action to a collateral attack on the earlier judgment.[214] Under this rule, the consent decrees would remain operative. Defendant employers would be immune from liability for employment practices unless the trial court found that the earlier judgment had been entered in the absence of proper jurisdiction over the subject matter, or "if the judgment [was] the product of corruption, duress, fraud, collusion, or mistake."[215] The dissent's suggestion on the role of the consent decree in a "reverse discrimination" action would establish the highest burden of proof on the plaintiffs.

V. CONCLUSION

The decision in *Martin v. Wilks* makes clear the procedural prerequisites necessary for finality in Title VII consent decree settlements. Parties to the Title VII suit must join non-minority employees as parties. This requirement was imposed by a recognition that the due process rights of the non-minority persons are at least equal to the right to equal employment opportunity of the minority plaintiff. The *Martin* majority rejected the contention that it is the obligation of the courts to provide a procedure which would satisfy the due process considerations without impairment of the progress of Title VII goals.

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reasonable." *Id.* (citing for reference Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971)).

210. *See supra* notes 30-36 and accompanying text.

211. *Miami,* 614 F.2d at 1332-33.

212. *See supra* notes 118-32 and accompanying text.

213. *Martin,* 109 S. Ct. at 2197 (Stevens, J., dissenting).

214. *Id.* at 2189 (Stevens, J., dissenting).

215. *Id.*

The net effect of the *Martin* opinion is to erect procedural and practical hurdles for persons seeking relief from discriminatory employment practices.[216] By requiring joinder of non-minority persons in the Title VII action, the *Martin* majority created the possibility that all Title VII actions will proceed to trial.[217] In this way, the decision delays the realization of equal opportunity in the workplace through greater participation of the judicial system in the remediation of discrimination.

The *Martin* decision placed a different obstacle in the path of persons who have already secured relief in the form of a consent decree. The *Martin* decision held that consent decrees entered into without participation of "necessary" parties are subject to challenges from those persons in the form of separate Title VII actions. The next issue for the Supreme Court in this area will concern the nature of a Title VII action which alleges "reverse discrimination" resulting from the operation of a consent decree.[218] It is not clear that the merits of the original Title VII action will not be relitigated.[219] For the defendant employers and the minority employees, the long process of obtaining the relief provided for under Title VII might begin again. In 1974, minority employees, the City of Birmingham, and the Jefferson County Board began a process of remedying past discrimination. In 1989, that process continues.

MATTHEW J. FAIRLESS

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216. *See supra* notes 133-88 for a discussion of the effect of the *Martin* decision on future Title VII actions.

217. *See supra* notes 172-87 and accompanying text.

218. *See supra* notes 188-215 and accompanying text for a discussion of this issue.

219. *See supra* notes 203-15 and accompanying text.